Before the
**FEDERAL COMUNICATIONS COMMISSION**
Washington, DC 20554

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| In the Matter of | ) | |
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| Annual Assessment of the Status of | ) | |
| Competition in the Market for the | ) | MB Docket No. 06-189 |
| Delivery of Video Programming | ) | |
| | ) | |

## COMMENTS OF CITY OF MINNEAPOLIS, MN

These Comments are filed by City of Minneapolis in support of the comments filed by the National Association of Telecommunications Officers and Advisors ("NATOA"), the National League of Cities ("NLC"), the National Association of Counties ("NACo"), the United States Conference of Mayors ("USCM"), and other national municipal organizations. Like the national municipal organizations, the City of Minneapolis believes that local governments want and continually encourage competition in the video programming marketplace. The local franchising process works and helps to ensure that all residents share in the benefits that increased competition brings to a community.

Our community previously filed Comments in the franchising proceeding, MB Docket No. 05-311, the Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992. Because this Notice of Inquiry raises many of the same issues that were addressed by our earlier comments, we are attaching a copy of those comments for inclusion in this proceeding.

The local cable franchising process functions well in the City of Minneapolis and it ensures that our community's specific needs are met and that local customers are protected. While we encourage efforts to increase competition in the video programming marketplace, the Commission should do nothing to impair the operation of the local franchising process as set forth under the existing federal regulatory scheme. The local cable franchising process should not be used as an excuse for the failure of new cable service providers to enter into the marketplace.

Respectfully submitted,

City of Minneapolis
By: Gail Plewacki, Minneapolis Cable Officer
350 South 5th Street, Room 123 City Hall
Minneapolis, MN 55415

November 27, 2006

Before the
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Washington, DC 20554

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| In the Matter of<br>Implementation of Section 621(a)(1) of<br>the Cable Communications Policy Act of 1984<br>as amended by the Cable Television Consumer<br>Protection and Competition Act of 1992 | )<br>)<br>)<br>)<br>) | MB Docket No. 05-311 |

**INITIAL COMMENTS OF THE BURNSVILLE/EAGAN TELECOMMUNICATIONS COMMISSION; THE CITY OF MINNEAPOLIS, MINNESOTA; THE NORTH METRO TELECOMMUNICATIONS COMMISSION; THE NORTH SUBURBAN COMMUNICATIONS COMMISSION; AND THE SOUTH WASHINGTON COUNTY TELECOMMUNICATIONS COMMISSION**

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## SUMMARY

The Burnsville/Eagan Telecommunications Commission, the City of Minneapolis, Minnesota, the North Metro Telecommunications Commission, the North Suburban Communications Commission and the South Washington County Telecommunications Commission (the "LFAs") are local government units that administer and enforce cable franchises, receive and review franchise applications, and in some cases, award cable franchises. The LFAs therefore have a vested interest in local cable franchising, and would be significantly impacted by any action taken by the Federal Communications Commission ("the Commission" or "the FCC") pursuant to its November 18, 2005, Notice of Proposed Rulemaking ("NPRM").

The FCC Lacks Authority to Preempt or Interfere with Local Franchising

The LFAs do not believe that the FCC has the authority to preempt or modify local cable system franchising procedures and requirements. This is due, in part, to the fact that Congress designated the courts as the fora where franchising disputes are to be heard. Moreover, Congress has not explicitly empowered the FCC to interfere with or to preempt local franchising processes in Section 621(a) of the Cable Communications Policy Act of 1984, as amended (the "Cable Act"), or elsewhere in the Communications Act of 1934, as amended (the "Communications Act"). In other words, there is no clear and unmistakable Congressional intent to preempt local franchising requirements, processes and procedures. Consequently, the FCC may not rely on § 621(a)(1) to eviscerate local franchising processes (either prior to or after final action has been taken on a competitive franchising application). Nor may the FCC expand the scope of § 621(a)(1) beyond the plain language adopted by Congress.

The Commission also relies on Title I of the Communications Act for authority to preempt local franchising processes and procedures. However, Title I of the Communications

Act cannot function as an independent source of authority, since any authority granted therein must be rooted in specific substantive provisions elsewhere in the Communications Act. As indicated above, nowhere in the Communications Act is the FCC explicitly empowered to restrict or revise local franchising processes. If Congress had intended to enable the FCC to intrude into a fundamental area of state/local sovereignty, like franchising, it would have had to make its intent clear and unmistakable – it did not do so. To the contrary, Congress has made clear that it intended to preserve local franchising. Because public property is at stake, any action by the FCC to preempt or restrict local franchising would likely raise Fifth Amendment issues.

Local Franchising Promotes Federal Objectives

The Cable Act sets forth a number of Congressional objectives for cable communications, including: the promotion of competition; ensuring that cable systems are responsive to the needs of the local community; and assuring that cable communications provide the widest possible diversity of information sources and services to the public. Local franchising serves and promotes these objectives. For instance:

- The LFAs' franchises are non-exclusive, and contain level playing field requirements which encourage fair competition. Contrary to industry assertions, there is nothing inherently anti-competitive about level playing field provisions which afford local governments the flexibility to establish competitively neutral franchise commitments.
- The LFAs' franchises contain requirements for PEG capacity and institutional networks which advance Congress' desire for diverse information sources.
- The LFAs' franchises are specifically tailored to meet the needs and interests of the community. A one-size-fits-all approach to franchising would invariably result in legitimate and lawful needs and interests going unmet in some cases.

In addition, the LFAs' franchises support the growth of cable systems through reasonable system build-out requirements that also satisfy Congress' directive to prevent economic redlining. Contrary to telephone industry claims, local build-out requirements should not be barrier to

entry, because the Cable Act obligates local franchising authorities to give new entrants a reasonable period of time to build their system throughout the franchise area.

The Local Franchising Process Enhances Competition and Creates Opportunities

The LFAs support fair competition. Indeed, the LFAs encourage wireline competition in the delivery of video programming because it has been shown to reduce rates. In Minnesota, competition among providers is encouraged by the streamlined franchising process set forth in state law, which spells out minimum franchise application contents and specifies minimum local franchise requirements. Given the existence of clearly defined state franchise procedures, the entire local franchising process can be completed in a relatively short period of time, particularly if the applicant is reasonable and cooperative. Market entry is also streamlined by the existence of municipal joint powers commissions. These commissions frequently review franchise applications and negotiate franchises on behalf of their member cities. Consequently, a franchise applicant can submit a single application covering numerous jurisdictions, and negotiate multiple franchises with a single entity. The success of local franchising practices in Minnesota is underscored by the fact that forty-seven communities have awarded competitive cable franchises.

Aside from establishing certain procedures and requirements for local cable franchising, Minnesota law has established limited market entry requirements for telecommunications service providers. For instance, under state law, local governments cannot franchise telecommunications systems and possess limited right-of-way management authority over telecommunications right-of-way users. Accordingly, advanced broadband networks can be constructed and operated without invoking the local cable franchising process (provided video service is not offered and cable television-specific equipment and facilities are not installed). Thus, local cable franchising cannot be said to impede the deployment of advanced broadband networks in Minnesota.

It should also be noted that video competition is in fact developing, consistent with federal goals. In this regard, competitive franchises are being awarded by a number of local governments around the country, which suggests that true barriers to entry do not exist. In the event that a franchise application is denied, Congress has specified a clear judicial path for review of the franchising authority determination. Far from being a barrier to entry, the franchise process ensures the needs and expectations of all parties are met and the rights of all participants are protected.

Conclusion

Local cable franchising is enabling video competition around country, and in so doing is promoting the deployment of advanced broadband networks. Thus, the dual regulatory scheme created by Congress is working, and should not be disturbed. Abstention is particularly appropriate in this case because there is no incontrovertible evidence showing that local franchising is inhibiting multichannel video distribution competition. As importantly, the FCC possesses no plenary authority to preempt or restrict local franchising processes under Title I or Title VI of the Communications Act. If the Commission was to supersede or modify local franchising processes and procedures, Fifth Amendment issues would likely be raised.

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**INITIAL COMMENTS OF THE BURNSVILLE/EAGAN TELECOMMUNICATIONS COMMISSION; THE CITY OF MINNEAPOLIS, MINNESOTA; THE NORTH METRO TELECOMMUNICATIONS COMMISSION; THE NORTH SUBURBAN COMMUNICATIONS COMMISSION; AND THE SOUTH WASHINGTON COUNTY TELECOMMUNICATIONS COMMISSION**

## I. INTRODUCTION.

These comments are filed on behalf of the City of Minneapolis, Minnesota and the following municipal joint powers commissions in the above-captioned proceeding: the Burnsville/Eagan Telecommunications Commission (a municipal joint powers commission consisting of the cities of Burnsville and Eagan, Minnesota); the North Metro Telecommunications Commission (a municipal joint powers commission consisting of the cities of Blaine, Centerville, Circle Pines, Ham Lake, Lexington, Lino Lakes and Spring Lake Park, Minnesota); the North Suburban Communications Commission (a municipal joint powers commission consisting of the cities of Arden Hills, Falcon Heights, Lauderdale, Little Canada, Mounds View, New Brighton, North Oaks, Roseville, St. Anthony and Shoreview, Minnesota); and the South Washington County Telecommunications Commission (a municipal joint powers commission consisting of the municipalities of Woodbury, Cottage Grove, Newport, Grey Cloud

Island Township and St. Paul Park, Minnesota) (collectively, the "LFAs").[1] The LFAs represent twenty-five cities and townships in Minnesota, with a combined population of over 750,000. Comcast of Minnesota, Inc., Comcast of Minnesota/Wisconsin, Inc. and Time Warner Cable, Inc. are the incumbent wireline cable service providers in the franchise areas represented by the LFAs.[2]

The LFAs are generally responsible for administering and enforcing their local cable franchises. The LFAs also receive and resolve consumer complaints regarding cable service and cable modem service. In addition, the LFAs are empowered to receive and review applications for additional franchises and to negotiate the terms and conditions of competitive franchises. Under applicable state law, the City of Minneapolis, Minnesota, and the South Washington County Telecommunications Commission are authorized to award or deny franchises permitting the use of public rights-of-way by cable system operators.

Many of the LFAs operate video production facilities, and are actively involved in producing government access programming and/or making studios, edit suites and equipment available for public access programming. Additionally, several of the LFAs oversee and/or operate institutional networks which connect government facilities and are utilized for advanced video, voice and data applications. Thus, the LFAs have a significant interest in cable system franchising, and would be directly affected by any action the Federal Communications

[1] With the exception of the South Washington County Telecommunications Commission, the member cities of the various joint powers commissions award cable franchises to applicants. The joint powers commissions are generally responsible for enforcing and administering their member cities' cable franchises. The South Washington County Telecommunications Commission, however, is also empowered to award cable franchises on behalf of its member cities.

[2] Comcast of Minnesota, Inc., and Comcast of Minnesota/Wisconsin, Inc., are referred to in these comments as "Comcast." Time Warner Cable, Inc. is referred to herein as "Time Warner Cable."

Commission (the "Commission" or the "FCC") might take pursuant to its November 18, 2005, Notice of Proposed Rulemaking ("NPRM").[3]

The LFAs' comments will address the questions and issues raised in ¶¶ 10, 12, 14-17, 19-20 and 23 of the FCC's NPRM. As a general principle, the LFAs do not believe the FCC possesses the authority to preempt or modify local cable system franchising procedures and requirements pursuant to: (i) Section 621(a)(1) of the Cable Communications Policy Act of 1984, as amended by the Cable Television Consumer Protection and Competition Act of 1992 and the Telecommunications Act of 1996 (the "Cable Act"), 47 U.S.C. § 541(a)(1), as amended; (ii) Section 1 of the Communications Act of 1934, as amended (the "Communications Act"), 47 U.S.C. § 151; or (iii) Section 4(i) of the Communications Act, 47 U.S.C. § 154(i). If the Commission was to preempt or otherwise alter local franchising procedures and requirements based on the foregoing statutory provisions, the LFAs believe significant Constitutional issues would be raised. Moreover, if the Commission adopts preemptive regulations based on speculative, ambiguous and unsupported comments from regional bell operating companies, such rules would necessarily be arbitrary and capricious.

As a matter of sound public policy, the LFAs support fair competition and the flexibility afforded by current law to ensure that local needs and interests are met through the local franchising process, consistent with Congressional intent. To date, there is no concrete, incontrovertible evidence that proves franchising inhibits or otherwise bars the development of multichannel video competition and the deployment of advanced communications networks.

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[3] *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Notice of Proposed Rulemaking, MB Docket No. 05-311 (Rel. Nov. 18, 2005).

Indeed, the cable television industry has thrived under the existing franchising scheme and has spent billions of dollars upgrading its networks.[4]

There is substantial evidence that franchising of cable systems brings significant benefits to local communities and their residents. For example, public, educational and governmental ("PEG") access channel capacity dedicated in franchise agreements (i) ensures that governmental institutions can communicate effectively with their constituents, (ii) provides transparency in the policy-making process, (iii) makes informative and unique programming accessible to a broad audience, and (iv) allows diverse viewpoints to be exchanged effectively. Likewise, institutional networks constructed pursuant to local franchises enable local governments and educational institutions to communicate with each other and the public in a secure, efficient, effective and economical manner.

In the same vein, all of the LFAs' franchises contain customer service standards with which the franchised cable operator must comply. These standards, which are generally based on the FCC's minimum customer service regulations, ensure that Comcast and Time Warner Cable provide quality service and treat customers fairly. The need for customer service standards, and local enforcement of those standards, is underscored by the number and nature of subscriber complaints received by the LFAs. If the FCC was to take on the task of addressing subscriber complaints on a national basis, the administrative burden would be enormous. In addition to customer service standards, the LFAs' franchises contain build-out requirements for the entire franchise area (subject to certain density requirements). These build-out provisions help to ensure that cable service, and the other services offered over cable systems, are available

[4] Cable operators spent nearly $100 billion between 1996 and mid-2005 upgrading their systems, which included the introduction of fiber-optics and increased capacity. *See* National Cable & Telecommunications Association, *2005 Mid-Year Industry Overview* 7 (2005), *available at* www.ncta.com.

to as many people as possible. By preventing redlining, the LFAs are furthering the federal goal that advanced services and capabilities should be available to all, without regard to income.[5]

Finally, as a general matter, the LFAs' cable franchises delineate the terms and conditions under which Time Warner Cable and Comcast may use public rights-of-way. Local right-of-way requirements are a fundamental and extremely significant exercise of state and local sovereignty and implicate local police powers. Indeed, it is through right-of-way management provisions in local cable television franchises (and the codes and standards incorporated into cable franchises) that the LFAs are able to protect public health, safety and welfare by regulating the local conduct of cable operators in local streets and on public property.

## II. LOCAL CABLE SYSTEM FRANCHING IS CONSISTENT WITH AND PROMOTES FEDERAL OBJECTIVES.

### A. The LFAs' Local Franchises Reflect and Promote Federal Objectives for Cable Systems and Broadband Deployment.

Paragraph 10 of the NPRM queries "whether in awarding franchises, LFAs are carrying out legitimate policy objectives allowed by the [Communications] Act or are hindering the federal policy objectives of increased competition in the delivery of video programming and accelerated broadband deployment." In responding to this query, it is important to emphasize at the outset that the LFAs support and encourage fair competition in the delivery of multichannel video programming and the prompt deployment of advanced broadband networks consistent

[5] *See, e.g.*, Section 621(a)(3) of the Cable Act, 47 U.S.C. § 541(a)(3). The legislative history for § 541(a)(3) states that: "cable systems will not be permitted to 'redline' (the practice of denying service to lower income areas). Under this provision, a franchising authority in the franchising process shall require the wiring of all areas of the franchise area to avoid this type of practice." H.R. Rep. No. 934, 98th Cong. 2nd Sess. 59, *reprinted in* 1984 U.S.C.C.A.N. 4655, 5696 (1984). *See also Availability of Advanced Telecommunications Capability in the United States*, Fourth Report to Congress, 19 FCC Rcd 20540 (2004) ("Section 706 of the Telecommunications Act directs both the Commission and the states to encourage deployment of advanced telecommunications capability to all Americans on a reasonable and timely basis.").

with applicable federal, state and local law.[6] It is also important to recognize that the promotion of competition in cable communications[7] is but one fundamental purpose of the Cable Act and the Communications Act. Other significant purposes of the Cable Act articulated by Congress include: establishing "franchise procedures and standards . . . which assure that cable systems are responsive to the needs and interests of the local community;"[8] and assuring "that cable communications provide the widest possible diversity of information sources and services to the public . . . ."[9] Congress concluded that all of these goals were best met through the local franchising process (with certain clearly defined federal limitations and mandates). Indeed, in enacting the Cable Act, Congress specifically stated that it was preserving existing cable franchising authority.[10]

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[6] *See, e.g.*, 47 U.S.C. § 541(a)(3) (prohibiting economic redlining), 47 U.S.C. § 541(a)(4)(A) (requiring a franchising authority to allow a new entrant's cable system a reasonable period of time to serve all households in the franchise area), and Minn. Stat. § 238.08, subd. 1(b) (generally specifying that no municipality can grant an additional cable service franchise on terms more favorable or less burdensome than those in the existing franchise with respect to area served).

[7] *See* 47 U.S.C. § 521(6).

[8] 47 U.S.C. § 521(2).

[9] 47 U.S.C. § 521(4).

[10] *See* H.R. Rep. No. 934 at 26, *reprinted in* 1984 U.S.C.C.A.N. 4655, 4663 (1984) (Congress intended that "the franchise process take place at the local level where [local] officials have the best understanding of local communications needs and can require cable operators to tailor the cable system to meet those needs."). Congress also stated that "the ability of a local government entity to require particular cable facilities (and to enforce requirements in the franchise to provide those facilities) is essential if cable systems are to be tailored to the needs of each community [and the Cable Act] explicitly grants this power to the franchising authority." *Id.* According to the House Report on H.R. 4103, whose terms were later incorporated into the Cable Act, "cable television has been regulated at the local government level through the franchise process . . . . H.R. 4103 establishes a national policy that clarifies the current system of local, state and federal regulation of cable television. This policy continues reliance on the local franchising process as the primary means of cable television regulation . . . . The bill establishes franchise procedures and standards to . . . assure that cable systems are responsive to the needs and interests of the local communities they service." H.R. Rep. No. 934 at 19, *reprinted in* 1984 U.S.C.C.A.N. 4655, 4656 (1984).

The non-exclusive cable franchises awarded by the LFAs or their member cities clearly advance the many federal policy objectives established by Congress. As indicated above, one of Congress' objectives in enacting the Cable Act is to promote the dissemination of diverse information.[11] The LFAs' franchises further this objective. All of the franchises, for example, contain requirements for PEG access channel capacity.[12] Such capacity can be required in accordance with Section 611(b) of the Cable Act, 47 U.S.C. § 531(b).[13] In this regard, the North Suburban Communications Commission franchises include an obligation for twelve 6 MHz PEG channels.[14] In the North Metro Telecommunications Commission franchise areas, Comcast agreed to dedicate six 6 MHz channels for PEG access purposes,[15] while in the South Washington County Telecommunications Commission franchise area five 6 MHz channels are dedicated for PEG access purposes.[16] The LFAs and/or the PEG access channel managers utilize this capacity as outlets for video programming that typically would not otherwise be disseminated or for the expression of unique viewpoints. Indeed, the public access channels

[11] *See, e.g.*, H.R. Rep. No. 934 at 30, *reprinted in* 1984 U.S.C.C.A.N. 4655, 4667 (1984) ("One of the greatest challenges over the years in establishing communications policy has been assuring access to the electronic media by people other than the licensees or owners of those media. The development of cable television, with its abundance of channels, can provide . . . the meaningful access that . . . has been difficult to obtain.").

[12] One of the primary purposes of PEG access is to afford "groups and individuals who generally have not had access to electronic media with the opportunity to become sources of information in the electronic marketplace of ideas." H.R. Rep. No. 934 at 30, *reprinted in* 1984 U.S.C.C.A.N. 4655, 4667 (1984).

[13] *See also* Minn. Stat. § 238.084, subd. 1(z) (requiring a franchise provision which establishes the minimum number of access channels that a franchised cable operator must make available).

[14] *See* Affidavit of Coralie A. Wilson at 2, attached hereto as Exhibit A.

[15] *See, e.g.,* § 6.1.2 of the Blaine, Minnesota franchise ordinance, *available at* www.northmetro15.com/commission/franchise.htm.

[16] *See* § 6.1 of the South Washington County Telecommunications Commission cable franchise. The South Washington County Telecommunications Commission franchise is available at www.swctc.org/documents/swctc%20franchise%20adopted%20103002.pdf.

provided pursuant to the LFAs' franchises provide an open forum for virtually any type of lawful speech or expression.

The public makes significant use of available public access channel capacity. For instance, in the North Suburban Communications Commission franchise areas, approximately 246 hours of original programming is cablecasted on four public access channels each month.[17] Overall, a total of about 1,558 hours of public access programming is cablecasted each month on the North Suburban Communications Commission public access channels.[18] Citizens and staff in the North Metro Telecommunications Commission franchise areas also produce an impressive amount of public access programming each year. In 2005, for example, an average of 100 hours of new public access programming was cablecasted each month on two public access channels.[19] In December of 2005, a total of 2,022 hours of public access programming was cablecasted.[20] All of these public access productions are made possible by hundreds of volunteers that produce and edit programming on a monthly basis.[21] As is evident from the amount of programming produced, the LFAs' public access channels function as a vibrant video "soapbox" for independent expression in the community.[22]

The public schools in the LFAs' franchise areas also make use of the PEG capacity provided pursuant to local cable television franchise agreements. Many local school districts use their channel capacity to cablecast board meetings, sporting events, concerts, and special events,

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[17] *See* Affidavit of Coralie A. Wilson at 2.
[18] *Id*. at 2-3.
[19] *See* Affidavit of Heidi Arnson at 2, attached hereto as Exhibit B.
[20] *Id*.
[21] *See* Affidavit of Coralie A. Wilson at 3 and Affidavit of Heidi Arnson at 2.
[22] H.R. Rep. No. 934 at 30, *reprinted in* 1984 U.S.C.C.A.N. 4655, 4667 (1984) ("Public access channels are often the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet . . . .").

such as award ceremonies and graduations.[23] The Mounds View School District, for example, produces an average of eight hours of original programming each month, and cablecasts 296 hours of repeat programming on a monthly basis.[24] The Roseville Area School District produces two or three programs a week during the school year.[25] Moreover, all of the educational access channels in the North Suburban Communications Commission franchise areas are programmed twenty-four (24) hours a day.[26] As with public access programming, much, if not all, educational access programming would not have an outlet (and probably would not be produced at all) but for the existence of PEG channel capacity included in local franchise agreements. This programming is an important source of information and entertainment, and allows public school districts to communicate with parents and students efficiently over a wide geographic area.

All of the LFAs have reserved channel capacity for governmental access use.[27] This capacity is primarily used to cablecast: (i) city council meetings and other municipal meetings (*e.g.*, planning commission meetings and parks and recreation commission meetings); (ii) election coverage (*e.g.*, candidate profiles and fora); (iii) local parades and events; (iv) talk shows with local officials and residents; (v) local debates; and (vi) locally produced documentaries.[28] As is evident from the variety of programming produced, government access channels are used to show local government at work, to provide transparency and accountability to constituents, to form a sense of cohesive community and civic pride and to communicate with

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[23] *See* Affidavit of Coralie A. Wilson at 3 and Affidavit of Heidi Arnson at 3.
[24] *See* Affidavit of Coralie A. Wilson at 3.
[25] *Id.*
[26] *Id.*
[27] *See, e.g.*, the Affidavit or Coralie A. Wilson at 3-4, § 6.1 of the South Washington County Telecommunications Commission franchise, § 6.2.1 of the North Metro Telecommunications Commission franchises, and the Affidavit of Heidi Arnson at 2-3.
[28] *See* Affidavit of Coralie A. Wilson at 3-4 and Affidavit of Heidi Arnson at 2-3.

local residents.[29] The LFAs' government access channels are used frequently, with approximately 1,051 hours of government access programming cablecasted each month on the discrete government access channels in the North Suburban Communications Commission franchise areas.[30] According to the North Metro Telecommunications Commission, there were approximately 5,717 government access program playbacks last year on the member cities' discrete government access channels.[31] The South Washington County Telecommunications Commission cablecasts twenty-four (24) government meetings each month and produces 175 original government programs each year. During local and state elections, candidate profiles are taped, candidate fora are cablecasted live, and live election results are reported on the government access channel.

In addition to PEG access channel capacity, the LFAs may require the construction of an institutional network and may mandate that capacity on the institutional network be designated for governmental and educational use.[32] All of the LFAs' franchises contain enforceable requirements for the construction and provision of an institutional network and for the use of capacity on the institutional network.[33] The technical specifications and characteristics of the individual networks may vary, but the fundamental purpose of each institutional network is the

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[29] H.R. Rep. No. 934 at 30, *reprinted in* 1984 U.S.C.C.A.N. 4655, 4667 (1984) (One of the purposes of government access channel capacity is "showing the public local government at work.").

[30] *See* Affidavit of Coralie A. Wilson at 3-4.

[31] *See* Affidavit of Heidi Arnson at 3.

[32] *See, e.g.*, 47 U.S.C. § 531(b) (specifying that channel capacity on institutional networks may be dedicated for educational and governmental use) and 47 U.S.C. § 544(b) (stating that local franchising authorities may establish requirements for cable-related facilities and equipment). *See also* H.R. Rep. No. 934 at 68, *reprinted in* 1984 U.S.C.C.A.N. 4655, 4705 (1984) ("Facility and equipment requirements may include requirements which relate to channel capacity; [and] system configuration and capacity, including institutional and subscriber networks . . . .").

[33] *See, e.g.*, § 7 of the South Washington County Telecommunications Commission franchise, Affidavit of Coralie A. Wilson at 4, § 7 of the North Metro Telecommunications Commission member city franchises and Affidavit of Heidi Arnson at 3.

same: to permit local governments to communicate effectively and efficiently both internally (*e.g.*, with other municipal departments) and externally (*e.g.*, with other political subdivisions, businesses and residents) using a variety of voice, video and data applications.

The North Suburban Communications Commission manages the institutional network for its member cities and provides and maintains necessary electronics.[34] According to Coralie A. Wilson, Executive Director of the North Suburban Communications Commission, the institutional network serving the member cities functions as a critical transport platform for data between municipalities, including the distribution of vital geographic information system data.[35] Several member cities also use the institutional network for backbone transport of VoIP communications. With regard to video, the institutional network enables the North Suburban Communications Commission to originate programming from remote locations and permits the sharing of video programming with other communities through interconnection links.[36] There are currently over eighty (80) institutions connected to the institutional network serving the North Suburban Communications Commission member cities.[37] The institutional network constructed for the North Metro Telecommunications Commission's member cities currently connects fifty-four (54) sites, and is used for fire department training and data transmission, among other things.[38] It goes without saying that institutional networks allow the LFAs to realize cost savings by enabling them to reduce or eliminate their reliance on leased telecommunications lines. Institutional networks also allow local governments to quickly and easily disseminate diverse information to local residents and to the world through Internet

[34] *See* Affidavit of Coralie A. Wilson at 4.
[35] *Id.*
[36] *Id.*
[37] *See id.* at 4 and Attachment 1.
[38] *See* Affidavit of Heidi Arnson at 3.

connections and publicly available databases. This capability is consistent with Congress' goal of assuring that cable communications provide the widest possible diversity of information sources to the public.

Besides operating institutional networks, many local franchising authorities operate local emergency alert systems. These systems, which can be activated by local governments, are developed pursuant to local cable franchises, in cooperation with franchised cable operators, and typically would not exist but for local franchise requirements. Unlike national, state and regional emergency alert systems, local emergency alert systems allow local governments to utilize a cable system (by overriding audio and/or video on the system) to inform the public of localized emergencies that might not warrant coverage on metropolitan broadcast networks or require a more global emergency response. The events of September 11, 2001, underscored the fact that local governments play an important role in homeland security and disaster management and are often first responders to natural disasters and terrorist attacks. The development of emergency alert systems enhances the ability of local governments to effectively carry out their important public safety mission. Thus, through local franchising, local governments can ensure that cable systems provide necessary emergency alert capabilities, consistent with Congress' goal that cable systems should be responsive to the needs and interests of the local community.[39]

In Section 601(2) of the Cable Act, 47 U.S.C. § 521(2), Congress manifested its desire to "encourage the growth and development of cable systems." The LFAs' have promoted the growth and development of cable systems in their communities by, among other things, negotiating system build-out requirements with their incumbent cable operators. These requirements generally obligate Comcast and Time Warner Cable to construct their systems

[39] *See* § 602(2) of the Cable Act, 47 U.S.C. § 521(2).

throughout the entire franchise area (either at standard installation charges or with a financial contribution from subscribers, depending on the housing density of the location at issue).[40] This approach prevents economic redlining, consistent with 47 U.S.C. § 541(a)(3), and ensures that a community's cable system is capable of growing and adapting as the franchise area develops and the services available over the cable system continue to develop.[41] It is important to note that the LFAs' build-out requirements balance the benefits of universal coverage with the costs of constructing facilities in areas with a small and/or scattered population or challenging geographical features. Placing undue economic burdens on cable operators does not serve the public interest because cable rates will inevitably rise, and the cable operator's ability to continuously upgrade its system and to roll out new and advanced services will be inhibited. Given the importance of advanced cable systems in today's information economy, it is important that local franchising authorities have significant flexibility to encourage the construction and growth of cable systems in a manner that satisfies their needs and interests and reflects their particular social and economic circumstances.

In its NPRM, the Commission asks whether build-out requirements create barriers to entry for facilities-based providers of telephone and/or broadband services.[42] Many of these facilities-based providers, however, have already deployed facilities throughout the communities they serve. Thus, build-out requirements will either not be an issue, because the provider is

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[40] *See, e.g.*, § 4.4 of the North Metro Telecommunications Commission member city franchises, and § 4.3 of the South Washington County Telecommunications Commission franchise.

[41] The legislative history for § 541(a)(3) states that: "cable systems will not be permitted to 'redline' (the practice of denying service to lower income areas). Under this provision, a franchising authority in the franchising process shall require the wiring of all areas of the franchise area to avoid this type of practice." H.R. Rep. No. 934, 9th Cong. 2nd Sess. 59, *reprinted in* 1984 U.S.C.C.A.N. 4655, 5696 (1984). Local concerns about economic redlining are warranted given statements from AT&T (formerly SBC) that most "low value" consumers will be bypassed by its upgraded networks. *See, e.g.*, NPRM at ¶ 6.

[42] NPRM at ¶ 23.

already able to serve most if not all households in a given community, or a minor issue, because only an insignificant amount of additional plant construction may be necessary to satisfy a build-out requirement. To prevent unreasonable build-out demands, the Cable Act specifies that *local franchising authorities* must give new entrants "a reasonable period of time to become capable of providing cable service to all households in the franchise area . . . ."[43] At the same time, the Cable Act mandates that *local franchising authorities* establish build-out requirements which "assure access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides."[44] Accordingly, the Cable Act clearly empowers local franchising authorities, not the Commission, to implement the federal requirement to prohibit economic redlining and the federally-mandated obligation to give a new market entrant a reasonable period of time in which to construct its cable system. Congress could have, but did not, create a role for the Commission in these areas, and any assertion of jurisdiction by the FCC over build-out requirements would be unsupported by the text of the Cable Act and Congressional intent and would, therefore, be arbitrary and capricious.

Industry and Commission fears about local build-out requirements are misplaced. Local franchising authorities must establish reasonable build-out requirements consistent with § 541(a)(4)(A) and state law. However, what is reasonable in one municipality may not be reasonable in another, depending on a variety of factors including (but not limited to): (i) the facilities an applicant already has in place; (ii) local population demographics; (iii) housing density patterns; and (iv) local geography. A federal maximum and/or minimum system build-out timeframe for competitive franchise applicants could therefore compel a local franchising

[43] 47 U.S.C. § 541(a)(4)(A).
[44] 47 U.S.C. § 541(a)(3).

authority to act unreasonably and to cause a violation of § 541(a)(4)(A). On the other hand, the current practice of allowing local franchising authorities to tailor build-out requirements[45] to specific circumstances, because a "reasonable period of time" to construct or expand a cable system will vary from provider to provider and community to community, furthers Congress' complementary objectives of promoting competition, preventing economic redlining, and ensuring that local needs and interests are satisfied.

Although not listed in Section 601 as "purposes" of the Cable Act, the establishment and enforcement of customer service standards have been delineated by Congress as a fundamental role for local franchising authorities. In fact, Section 632(a)(1) of the Cable Act, 47 U.S.C. § 552(a)(1), specifies that a local franchising authority may "establish and enforce . . . customer service requirements of the cable operator . . . ." The enactment of § 552(a)(1) makes clear that Congress recognized local problems should be handled and resolved locally, while at the same time authorizing the FCC to establish uniform "minimum" standards that local franchising authorities and cable operators can utilize. Any other approach would create tremendous administrative burdens for the FCC, since there are thousands of cable systems across the country which generate subscriber complaints. Congress also preserved the ability of state and local governments to adopt customer service requirements consistent with federal law.[46] Such requirements may exceed the FCC's national "minimum" customer service regulations or address matters not covered by FCC regulations.[47] It is therefore evident that Congress intended to provide local franchising authorities with the ability to protect consumers from inept, unlawful or unscrupulous cable operator behavior.

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[45] These requirements must, of course, be consistent with state law.
[46] *See generally* § 632(d) of the Cable Act, 47 U.S.C. § 552(d).
[47] *See* § 632(d)(2) of the Cable Act, 47 U.S.C. § 552(d)(2).

In accordance with § 552 and applicable law, the LFAs negotiated customer service requirements in their franchises.[48] In most cases, these requirements are based on the FCC's "minimum" customer service standards. The customer service requirements are invoked and enforced, as appropriate, when the LFAs receive a complaint. The LFAs typically advertise a telephone number and/or address (*e.g.*, on subscriber bills and/or the Internet) that can be used to file a complaint. An employee is usually charged with investigating and resolving all complaints that are received. In many cases, complaints are filed after a subscriber has been unable to satisfactorily resolve a complaint with their cable operator directly, so the LFAs are frequently a regulator and problem solver of last resort. Because one or more persons are typically responsible for addressing subscriber complaints within a single franchise area, the LFAs are able to respond quickly and thoroughly. That would not likely be the case if cable complaints were to be handled on a national basis by a single federal agency or at the state level. Consumers might therefore be left unprotected if local enforcement of customer service standards is eliminated.

As is evident from the discussion above, all of the LFAs' franchises are the product of a local franchising process which considered local cable-related needs and interests. The resulting franchises are, therefore, tailored to meet the specific needs and interests of each community or group of member cities and their constituents, including (but not limited to) subscribers, local program producers, educational institutions and governmental institutions.[49] Consequently, the LFAs' franchises are not identical (although franchises negotiated by joint powers commissions

[48] *See, e.g.*, § 5.5 of the North Metro Telecommunications Commission member city franchises, and § 5.5 of the South Washington County Telecommunications Commission franchise.

[49] It should be noted, however, that Minnesota state law does establish certain uniform minimum franchise requirements. *See* Minn. Stat. § 238.084. That said, local cable-related needs and interests must still be met. *See, e.g.*, Minn. Stat. § 238.084, subd. 4.

on behalf of their member cities are virtually identical). The existence of diversity in franchising reflects Congress' goal that "cable systems are responsive to the needs and interests of the local community."[50] While some regional bell operating companies may argue that this diversity is a "barrier" to market entry, the LFAs posit that diversity promotes competition by ensuring the social obligations taken on by cable operators, in return for the use of scarce and valuable public rights-of-way, are commensurate with the needs and interests articulated by a community. A one-size fits all approach to franchising will invariably result in legitimate and lawful local needs and interests going unmet in certain cases (in contravention of Congressional intent and the Cable Act)[51] and in other cases could result a cable operator assuming social obligations (and associated costs) which are unnecessary, in light of existing cable-related needs and interests.

When the Commission queries in ¶ 13 of the NPRM whether cable service requirements should vary greatly from jurisdiction to jurisdiction, it is really asking whether local franchising authorities should be able to require cable system operators to meet local cable-related needs and interests. The answer is emphatically "yes." When Congress enacted the Cable Act, it clearly intended that cable operators would be required to meet local needs and interests[52] and the plain language of the Cable Act implements Congress' manifest intent.[53] The need for local flexibility

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[50] *See* § 601(2) of the Cable Act, 47 U.S.C. § 521(2).

[51] *See, e.g.*, § 621(a)(4)(B) of the Cable Act, 47 U.S.C. § 541(a)(4)(B) (providing that local franchising authorities "may require adequate assurance that the cable operator will provide adequate public, educational, and governmental access channel capacity, facilities, or financial support . . .").

[52] *See, e.g.*, H.R. Rep. No. 934 at 24 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4661 (wherein Congress said it intended that: "the franchise process take place at the local level where [local] officials have the best understanding of local communications needs and can require cable operators to tailor the cable system to meet those needs").

[53] *See, e.g.*, 47 U.S.C. § 531(b) (authorizing local franchising authorities to require channel capacity on a cable system to be dedicated for public, educational and governmental use), 47 U.S.C. § 541(a)(4)(B) (permitting local franchising authorities to require adequate assurance that cable operators seeking a franchise will provide adequate public, educational, and governmental

in franchising and for continued local authority to require and/or negotiate important social obligations in franchise documents is as important, if not more important, today than it was in 1984. As the ownership and control of communications facilities and media content have become more consolidated and centralized in recent years, it is only through customized franchise requirements that local concerns about public safety (*e.g.*, safety issues posed by system construction and extensions and damage to public rights-of-way), economic redlining (local government knows best about what requirements for building out an advanced cable system are most reasonable, given the particular demographic and topographical features of the community and any limitations imposed by state law) and content diversity (*e.g.*, ensuring a diversity of viewpoints on a system by dedicating adequate PEG capacity) can be adequately addressed.

Before usurping municipal franchising policies, procedures and requirements, and upsetting the longstanding dual regulatory scheme that has permitted the cable industry to thrive, while at the same time supporting localism, the FCC must be certain that a concrete and intractable problem exists. The basis for the NPRM seems to be based primarily on complaints from Verizon and AT&T (formerly SBC) and other regional bell operating companies.[54] However, the accusations made by those companies are generally speculative, ambiguous and unsupported. The facts show that local franchising has encouraged the widespread deployment of advanced cable systems around the nation. Nationally, 105 million households were passed

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access channel capacity, facilities, or financial support), 47 U.S.C. § 541(a)(4)(C) (permitting local franchising authorities to require adequate assurance that cable operators seeking a franchise have the financial, technical, or legal qualifications to provide cable service), 47 U.S.C. § 544(b) (authorizing local franchising authorities to establish facilities and equipment requirements in requests for proposals for franchises), and 47 U.S.C. § 546(a)(1) (permitting local franchising authorities to identify the community's future cable-related needs and interests).

[54] *See, e.g.*, NPRM at ¶¶5-6.

by bidirectional cable plant as of year-end 2004, and approximately 99 million households were passed by cable systems with an upper frequency limit of 750 MHz or higher.[55] Further, more than one million miles of cable plant have been upgraded to fiber-optics.[56] Overall, cable operators invested approximately $100 billion in their networks during the period from 1996-2005 – all while being franchised.[57] As a result, advanced services are now available to 93 percent of the households passed by cable systems (approximately 103 million households).[58] It is therefore evident that local franchising does not stifle investment in network upgrades or the deployment of advanced networks.

### B. Local Franchising Procedures Do Not Frustrate Federal Policy Goals.

In ¶ 12 of the NPRM, the FCC asks whether the "regulatory process involved in obtaining franchises" impedes the realization of federal policy goals. The LFAs assume that the goals being referred to by the Commission here are (i) increased competition in the delivery of video programming and (ii) accelerated broadband deployment.[59] Based on available evidence and existing franchising procedures, the LFAs believe the answer to the Commission's question is "no" for a number of reasons.

First, the LFAs and other local franchising authorities support fair competition. Indeed, it is evident that wireline competition in the delivery of multichannel video programming is the only way to discipline rates effectively. In this regard, the United States Government Accounting Office has observed that:

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[55] National Cable & Telecommunications Association, *2004 Year-End Industry Overview* 4 (2004), *available at* www.ncta.com.
[56] National Cable & Telecommunications Association, *2005 Mid-Year Industry Overview* 7 (2005), *available at* www.ncta.com.
[57] *Id*.
[58] *Id*. at 8-9.
[59] As discussed above, Congress delineated other important policy goals when it enacted the Cable Act, as amended.

> [t]oday, wire-based competition – that is, competition from a provider using a *wire* technology, such as a local telephone company or an electric utility – is limited to very few markets, with cable subscribers in about 2 percent of markets having the opportunity to choose between two or more wire-based video operators. However, in those markets where this competition is present, cable rates are significantly lower – by about 15 percent – than cable rates in similar markets without wire-based competition, according to our analysis of rates in 2001 . . . . Competition from DBS operators has induced cable operators to lower cable rates slightly . . . .[60]

The FCC has also concluded that competition between multiple wireline networks is critical to true price competition.[61] Consequently, given the correlation between wireline competition and reduced cable rates, the LFAs have no incentive to impede the market entry of beneficial wireline competitors. To the contrary, the LFAs have every incentive to encourage fair competition, to process competitive franchise applications in a timely manner, and to negotiate reasonable franchise terms, since it is wireline competitors who will help discipline the cost of broadband services and improve the overall quality of service delivered to consumers.

Second, the franchising procedure set forth in Minnesota law is very efficient.[62] Once a cable system applicant has been identified, a local franchising authority must publish a public notice of its intent to consider an initial franchise application in a newspaper of general

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[60] United States Government Accounting Office, *Issues Related to Competition and Subscriber Rates in the Cable Television Industry* 9 (October 2003).

[61] *See Availability of Advanced Telecommunications Capability in the United States*, Fourth Report to Congress, 19 FCC Rcd 20540 at *5 (2004) ("Having multiple advanced networks will also promote competition in price, features, and quality-of-service among broadband-access providers. This price-and-service competition, in turn, will have a symbiotic, positive effect on the overall adoption of broadband: as consumers discover new uses for broadband access at affordable prices, subscribership will grow; and as subscribership grows, competition will constrain prices . . . .").

[62] Paragraph 14 of the NPRM requests comments on the impact that state laws have on the ability of new entrants to obtain franchises.

circulation once each week for two successive weeks.[63] The contents of the notice are spelled out in Chapter 238 of Minnesota Statutes, so there should be little or no confusion or delay.[64] At least twenty (20) days from the first date of publication must be provided for the submission of applications.[65] The minimum contents of a cable system franchise application are set forth in Minn. Stat. § 238.081, subd. 4. A cable franchise applicant therefore has a good idea of what information must be included in its application even before it applies. Upon the submission of a proposal, an applicant and a local franchising authority may negotiate franchise terms.[66] The required minimum contents[67] of a franchise are delineated in Minn. Stat. § 238.084.[68] Accordingly, there is no need for significant negotiations, especially if a cable franchise applicant is cooperative and reasonable, and is clearly qualified from a financial, technical and legal standpoint.

Before awarding a franchise, a local franchising authority must hold a public hearing, at least seven days before the adoption of a franchise, after providing reasonable notice.[69] A cable franchise must be awarded by ordinance or other official action,[70] which means that one or more readings are usually necessary. Multiple readings, however, can typically be waived by local franchising authorities.[71] Accordingly, by following state procedures, there is no reason that a

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[63] *See* Minn. Stat. § 238.081, subd. 1.
[64] *See* Minn. Stat. § 238.081, subd. 2.
[65] *See* Minn. Stat. § 238.081, subd. 5.
[66] *See* Minn. Stat. § 238.081, subd. 4(b).
[67] Additional terms and conditions may be included in a franchise, provided they are consistent with state and federal law. *See* Minn. Stat. § 238.084, subd. 4.
[68] For instance, Minn. Stat. § 238.084, subd 1(m) specifies that an initial franchise must show that system construction throughout the franchise area must be substantially completed within five years. To the extent this timeframe is not reasonable in a given case, it would possibly be preempted by 47 U.S.C. § 541(a)(4)(A).
[69] *See* Minn. Stat. § 238.081, subd. 6.
[70] *See* Minn. Stat. § 238.081, subd. 7.
[71] *See, e.g.*, Affidavit of Coralie A. Wilson at 4.

cable franchise cannot be awarded by Minnesota local franchising authorities in a relatively short period of time. There is therefore no state regulatory "barrier" that impedes the deployment of advanced networks or the development of increased competition in the multichannel video program distribution market. On the other hand, cable franchise applicants can and do delay the franchising process through unreasonable behavior.[72]

Third, under Minnesota law, local franchising authorities cannot "franchise" telecommunications systems.[73] More specifically, state law provides that "no local government unit may . . . require a telecommunications right-of-way user to obtain a franchise or pay for the use of the right-of-way"[74] and that, with certain limitations, a "telecommunications right-of-way user . . . may construct, maintain, and operate conduit, cable, switches, and related appurtenances and facilities along, across, upon, above, and under any public right-of-way."[75] Local governments can manage their public rights-of-way with respect to telecommunications right-of-way users, but permissible management is limited to: (i) requiring registration; (ii) requiring

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[72] *See, e.g.*, Statement of the Honorable Ken Fellman to the United States House of Representatives Committee on Energy and Commerce and the Subcommittee on Telecommunications and the Internet at 14-15 (April 27, 2005), attached hereto as Exhibit C ("Verizon is seeking unilaterally to impose its own very aggressive nationwide franchise on all local communities. While Verizon may have the right to attempt such an approach, it can't fairly complain about delays resulting from its own, self-interested negotiating strategy."), and Comments of Manatee County, Florida, *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket 05-311 at 6 (Jan. 3, 2006) ("While the County was able to work with Verizon's draft, after significant modifications, this issue caused the process to be somewhat longer than otherwise would have been needed.").

[73] *See generally* Minn. Stat. §§ 237.162 and 237.163.

[74] *See* Minn. Stat. § 237.163, subd. 7(a)(4). The definition of a "telecommunications right-of-way user" explicitly excludes cable systems. Minn. Stat. § 237.162, subd. 4. Accordingly, the LFAs do not agree that telecommunications service providers may use §§ 237.162 and 237.163 to construct facilities and/or to install equipment that is to be used solely for the transmission of video services prior to obtaining a cable franchise pursuant to Chapter 238 of Minnesota Statutes and the Cable Act. *See* Minn. Stat. § 238.03.

[75] *See* Minn. Stat. § 237.163, subd. 2(a).

construction performance bonds and insurance coverage; (iii) establishing installation and construction standards; (iv) establishing and defining location and relocation requirements for equipment and facilities; (v) establishing coordination and timing requirements; (vi) requiring the submission of project data; (vii) requiring the submission of data on the location of facilities; (viii) establishing permitting requirements for street excavation and construction; (ix) establishing removal requirements for abandoned facilities; and (x) imposing penalties for unreasonable delays in construction.[76] Local governments may also recover their actual right-of-way management costs from telecommunications right-of-way users,[77] but "costs" are narrowly defined by statute.[78] Minnesota law has therefore established the market entry process for telecommunications service providers,[79] and has limited local authority to control access to public rights-of-way by telecommunications right-of-way users.[80] Accordingly, advanced broadband networks can be constructed and operated in Minnesota with minimal government oversight and without invoking the local cable franchising process (provided video service is not offered and cable television-specific equipment and facilities are not installed). Thus, local cable franchising does not impede the deployment of advanced broadband networks in Minnesota.

Fourth, from a practical standpoint, local franchising requirements are similar to zoning and local business regulation requirements. It cannot seriously be said that those types of requirements impede the development of business on a local or a national scale. If that was the

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[76] *See* Minn. Stat. § 237.162, subd. 8; *see also* Minn. Stat. § 237.163, subd. 2(b) for a description of permitted activities.

[77] *See* Minn. Stat. §§ 237.163, subd. 2(b) and 237.163, subd. 6.

[78] *See* Minn. Stat. § 237.162, subd. 9.

[79] Telecommunications right-of-way users must be authorized to conduct business in the State of Minnesota or be licensed by the FCC. Those matters are beyond the control of local franchising authorities.

[80] By referencing Minn. Stat. §§ 237.162 and 237.163, as current law, the LFAs are not necessarily agreeing with all the terms of those particular sections.

case, all commerce in the United States would come to a screeching halt. National, regional and local companies have historically been able to expand and to flourish while complying with state and local rights-of-way, licensing, land use and zoning requirements and other police power mandates. Wal-Mart, for example, has been able to comply with local procedures and requirements, while quickly expanding its footprint across the country. If local requirements were a *de facto* or *de jure* barrier to entry, Wal-Mart would not have been able to construct and to continue to operate the thousands of stores[81] it now owns and operates in thousands of municipalities across the United States.

Fifth, video competition is developing, consistent with Congressional and FCC goals. Indeed, additional cable franchises are being granted to new entrants around the country.[82] The FCC itself acknowledges this fact when it states "[a]necdotal evidence suggests that new entrants have been able to obtain cable franchises. In that regard, we note that SNET and Ameritech both obtained cable franchises before being acquired by SBC. Bell South and Qwest have obtained franchises, as have many cable overbuilders – RCN has acquired over 100."[83] In Minnesota, forty-seven (47) communities have awarded competitive cable franchises.[84] This is concrete evidence that state and local franchising policies and procedures do not inhibit multichannel

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[81] *See* http://investor.walmartstores.com/phoenix.zhtml?c=112761&p=irol-irhome.

[82] *See, e.g., In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eleventh Annual Report, 20 FCC Rcd. 2755, 2760 and 2823 at ¶¶ 14 and 126 (2005). *See also* Reply Comments of the National Cable & Telecommunications Association, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 05-255 at 10-11 (October 11, 2005) (stating that Ameritech obtained 11 cable franchises, BellSouth obtained 20 cable franchises, and Verizon has been awarded 11 cable franchises).

[83] *See* NPRM at ¶ 8 (footnotes omitted).

[84] "Minnesota Cities With Competitive Cable Service," attached hereto as Exhibit D.

video competition or the construction and deployment of advanced networks.[85] If local franchising procedures truly contained onerous requirements or resulted in significant delays, or if local governments were making unreasonable requests, the extensive roll-out of competitive wireline cable systems in Minnesota would never have occurred. Moreover, it is important to recognize that many of the communities listed in Exhibit D are in rural parts of the State of Minnesota. Thus, municipal franchising is furthering the federal goal of improving access to advanced services in rural areas of the nation, as part of the overall objective of making advanced telecommunications capability available to all Americans.[86]

Sixth, the existing statutory scheme effectively prevents the local franchising process from becoming an unreasonable barrier to entry. Section 621(a)(1) of the Cable Act, 47 U.S.C. § 541(a)(1), as the Commission notes in the NPRM, prevents local franchising authorities from unreasonably refusing to award additional cable franchises. In addition, § 621(a)(4)(A) of the Cable Act, 47 U.S.C. § 541(a)(4)(A), requires local franchising authorities to permit a

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[85] Indeed, the FCC itself did not identify local franchise requirements, processes and procedures as barriers to competition in the multichannel video distribution market in its Eleventh Annual Report on the status of competition in the video delivery market. *See In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eleventh Annual Report, 20 FCC Rcd. 2755, 2803-04 at ¶ 75 (2005). In comments submitted to the Commission *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Verizon concedes that there are only a "handful" of reported decisions addressing purported "unreasonable behavior" by local franchising authorities under § 541(a)(1). *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 05-255 at 20 (Sept. 19, 2005). Verizon assumes this means that municipal misdeeds are going unchecked by the current statutory scheme, but provides no real support. The LFAs would argue that the lack of litigation under § 541(a)(1) shows that local franchising authorities are acting reasonably in their dealings with competitive franchise applicants, and that there is no problem in need of resolution by the Commission, even assuming it possesses the power to intercede (which it does not).

[86] *See* Section 706 of the Telecommunications Act of 1996, § 706, Pub.L. 104-104, Title VII, Feb. 8, 1996, 110 Stat. 53, reproduced in the notes under 47 U.S.C. § 157 (The "Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . .").

competitive franchise applicant's cable system a reasonable period of time to become capable of providing service to all households in the franchise area. A competitive franchise applicant whose application has been denied by a final decision of a local franchising authority may seek judicial relief.[87] These are the tools Congress crafted to further the pro-competitive intent of the Cable Act, as amended. The Commission was not given a role. Rather, Congress chose to allow local franchising authorities to carry out the pro-competitive purposes of the Cable Act, with guidance from the courts when necessary. It is important to note that the Cable Act balances the desire for multichannel video competition against local government authority over who may access the public rights-of-way for private profit, and in this regard, § 621(a) does not bar *reasonable* denials of competitive franchise applications. At least one court has acknowledged this fact, stating "Congress intended to leave states [and their political subdivisions] with the power to determine the bases on which to grant or deny additional franchises, with the only caveat being that the basis for denial must be 'reasonable.'"[88] Thus, reasonable franchising decisions, even if they can legitimately be considered "barriers to entry," are consistent with the competitive goals of the Cable Act.[89]

Finally, it is important to recognize that there are several joint powers commissions in the Minneapolis/St. Paul metropolitan area. While most of these commissions do not grant franchises,[90] they do review franchise applications, negotiate franchise agreements and make

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[87] 47 U.S.C. § 541(a)(1). *See, e.g., Qwest Broadband Services, Inc. v. City of Boulder*, 151 F.Supp. 2d 1236 (wherein a federal district court struck down a local requirement that voters must approve a cable franchise before it is granted by the city).

[88] *Cable TV Fund 14-A Ltd. v. City of Naperville*, 1997 WL 280692 at *16 (N.D. Ill. 1997).

[89] The United States District Court in *City of Naperville* concluded that "it is certainly reasonable for the state to mandate denial of an additional franchise when the potential competitor is only willing to compete unfairly . . . ." *City of Naperville*, 1997 WL 280692 at *16.

[90] It should be noted that the South Washington County Telecommunications Commission does in fact award cable franchises on behalf of its five member municipalities.

recommendations on behalf of their member municipalities, which municipalities represent a significant number of Twin Cities suburbs. The Burnsville/Eagan Telecommunications Commission, the North Metro Telecommunications Commission, the North Suburban Communications Commission, and the South Washington County Telecommunications Commission alone represent twenty-five (24) municipalities and townships.[91] The establishment of joint powers commissions creates numerous economies for cable franchise applicants, because they can submit a single franchise application that covers multiple municipalities, and negotiate several franchises with a single entity. This capability reduces application and negotiation costs and the time needed to prosecute an application. Thus, joint powers commissions established in Minnesota actually promote competitive entry, rather than deter competition.

## III. THE FCC DOES NOT HAVE THE AUTHORITY UNDER THE COMMUNICATIONS ACT TO PREEMPT OR INTERFERE WITH LOCAL FRANCHISING REQUIREMENTS AND PROCEDURES.

In ¶¶ 15-17 and ¶ 19 of the NPRM, the Commission tentatively concludes that §§ 621(a) and 636 of the Cable Act, 47 U.S.C. §§ 541(a) and 556, and §§ 1 and 4(i) of the

[91] In addition to these joint powers commissions, other joint powers commissions in the metropolitan Twin Cities area include: the Ramsey/Washington Counties Suburban Cable Communications Commission (consisting of the municipalities of Birchwood, Dellwood, Grant, Lake Elmo, Mahtomedi, Maplewood, North St. Paul, Oakdale, Vadnais Heights, White Bear Lake, White Bear Township and Willernie, Minnesota); the Lake Minnetonka Communications Commission (consisting of the municipalities of Deephaven, Excelsior, Greenwood, Independence, Long Lake, Medina, Minnetonka Beach, Orono, Minnetrista, Loretta, St. Bonifacius, Shorewood, Spring Park, Tonka Bay, Victoria, and Woodland, Minnesota); the Northern Dakota County Cable Communications Commission (consisting of the municipalities of Inver Grove Heights, Lilydale, Mendota Heights, South St. Paul, Sunfish Lake and West St. Paul, Minnesota); the Northwest Suburbs Cable Communications Commission (consisting of the municipalities of Brooklyn Center, Brooklyn Park, Crystal, Golden Valley, Maple Grove, New Hope, Osseo, Plymouth and Robbinsdale, Minnesota); the Quad Cities Cable Communications Commission (consisting of the municipalities of Anoka, Andover, Champlin and Ramsey, Minnesota); and the Sherburne/Wright County Cable Communications Commission (consisting of the municipalities of Big Lake, Buffalo, Cokato, Dassel, Delano, Elk River, Maple Lake, Monticello, Rockford and Watertown, Minnesota).

Communications Act, 47 U.S.C. §§ 151 and 154(i), empower it to preempt state and local laws, regulations and franchising processes that "cause an unreasonable refusal to award a competitive franchise" or "unreasonably interfere with the ability of any new potential entrant to provide video programming to consumers."

### A. Section 621(a) of the Cable Act, 47 U.S.C. § 541(a), Does Not Provide the FCC with Any Preemptive Power Over Local Franchising Requirements and Procedures.

Section 621(a)(1) of the Cable Act, 47 U.S.C. § 541(a)(1), states that a local franchising authority "may not unreasonably refuse to award an additional competitive franchise" and that "[a]ny applicant whose application for a second franchise has been denied by a final decision of the franchising authority may appeal such final decision" to federal district court or a state court of competent jurisdiction. The Commission apparently believes this limitation of local authority and the designation of a judicial remedy for unreasonable denials of franchise applications empowers it to preempt or supersede local franchising requirements and procedures. There is, however, no language in Section 621 expressly conferring upon the FCC jurisdiction over local franchising processes. In fact, the legislative history of the Cable Act makes clear that Congress was preserving the pre-existing local role over the cable system franchising process. For instance, H.R. Rep. 934 underscores the fact that Congress intended to "preserve the critical role of municipal governments in the franchise process . . . ."[92] Accordingly, it is evident that Congress has not explicitly or implicitly authorized the Commission to preempt local franchising authority, processes and procedures pursuant to Section 621(a)(1). Indeed, Congress rejected the

[92] H.R. Rep. No. 934, 98th Cong., 2nd Sess. 1984, 1984 U.S.C.C.A.N. 4655, 4656 (1984). *See also National Cable Television Ass'n v. FCC*, 33 F.3d 66, 69 (D.C. Cir. 1994) (noting that one of the fundamental purposes of the Cable Act is to "preserve the local franchising system").

extension of plenary FCC authority over local franchising processes when it established the current dual regulatory scheme that recognized municipal cable system franchising authority.

The Commission can only preempt local franchising requirements and procedures if Congress has clearly authorized it to do so. As the Supreme Court has pointed out in *Louisiana Public Service Comm'n v. FCC*:[93]

> a federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority . . . . First, an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign state [and by implication its political subdivisions], unless and until Congress confers power on it. Second, the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of authority granted by Congress to the agency.[94]

Section 621(a) grants the FCC absolutely no power to preempt or otherwise interfere with local franchising processes.[95] Consequently, the FCC has no power under Section 621(a) to enforce Congress' directive that local franchising authorities not unreasonably refuse to award competitive cable franchises. This means the Commission may not lawfully promulgate regulations which preempt or have the effect of preempting local franchising authority, processes and procedures. If the Commission was to adopt such regulations, they would be arbitrary and capricious.[96]

Because there is no express authority for preempting local franchising processes in § 621(a)(1), the Commission must be interpreting that provision in a way which provides it with

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[93] 476 U.S. 355 (1986).
[94] *Id.* at 375.
[95] The LFAs are not commenting on whether the FCC has the authority to preempt particular franchise agreement provisions which may be inconsistent with Commission regulations or statutory provisions which the FCC is expressly empowered to enforce.
[96] *See Motion Picture Ass'n of America v. FCC*, 309 F.3d 796, 801 (D.C. Cir. 2002) (holding that an agency's interpretation of a statute is not entitled to deference absent a delegation of authority from Congress).

implied preemption authority. Such an interpretation, however, is not supportable. First, it is a fundamental tenet of statutory construction that the presence of an express preemption provision in one section of a statute is a reason not to imply preemption authority in a section of the same statute lacking an express preemption provision because "Congress knew how to pre-empt in this very statute when it wanted to."[97] The Communications Act is replete with statutory provisions which provide the Commission with preemptive power.[98] Section 621(a) just is not one of those provisions. Thus, implying preemptive authority from § 621(a) is inappropriate.

Moreover, given the legislative history of the Cable Act and the plain language of Section 621(a)(1), which recognizes and ratifies local franchising authority and expressly establishes a judicial remedy for any unreasonable final denial of a franchise application, Congress could not have intended to authorize the FCC to preempt or interfere with local franchising processes.[99] Indeed, any Congressional intent to displace traditional areas of local authority through the enactment of the Cable Act would need to be "clear and manifest" and

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[97] *Cable Television Ass'n of New York, Inc. v. Finneran*, 954 F.2d 91, 102 (2nd Cir. 1992) (citing *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. Abrams*, 899 F.2d 1315, 1319 (2nd Cir.1990)).

[98] *See, e.g.*, 47 U.S.C. § 253, which provides that, "[i]f, after notice and an opportunity for comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency." *See, e.g.*, 47 U.S.C. § 332(c)(7)(B)(v) (providing that any "person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief"), 47 U.S.C. § 252(e)(5) ("If a State commission fails to act to carry out its responsibility under this section, then the Commission shall issue an order preempting the State commission's jurisdiction . . . .") and 47 U.S.C. § 276(c) ("To the extent that any State requirements are inconsistent with the Commission's regulation the Commission's regulations on such matters shall preempt such State requirements.").

[99] *See, e.g., Nashoba Communications, L.P. v. Town of Danvers*, 893 F.2d 435, 440 (1st Cir. 1990) (stating "[i]t would be inconsistent with the legislative scheme to imply additional federal remedies which Congress apparently did not intend to supply").

unmistakable.[100] There is no clear and unmistakable language in § 621(a)(1) which suggests that Congress intended to imbue the Commission with any power to preempt or supersede local franchising authority, processes and procedures. Thus, the FCC cannot lawfully rely on Section 621(a)(1) for preemptive authority and may not utilize that provision to confer power upon itself.[101]

It should also be pointed out that § 621(a)(1) does not authorize interlocutory relief by the FCC. In other words, Section 621(a)(1) does not expressly empower the Commission to interfere in the franchising process before it is completed, contrary to what the FCC suggests in ¶¶ 15-17 and 19 of the NPRM. Rather, it specifically permits aggrieved cable franchise applicants to appeal to federal district court or an appropriate state court if their applications have been denied by the final decision of a local franchising authority.[102] This approach is logical and appropriate, because Congress did not intend to allow for FCC micromanagement of the local franchising process.[103]

If Congress had intended § 621(a)(1) to provide cable franchise applicants with FCC relief prior to the final denial of an application, it would have so stated.[104] In 47 U.S.C. § 546,

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[100] *See Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991). *See also Cable Television Ass'n of New York, Inc. v. Finneran*, 954 F.2d 91, 100 (2nd Cir. 1992) and *City of Dallas v. FCC*, 165 F.3d 341 (5th Cir. 1999) (stating that *Gregory vs. Ashcroft* prohibits implied preemption, and that a clear statement of preemptive intent is necessary to displace traditional state and local powers).

[101] *Louisiana Public Service Comm'n*, 476 U.S. at 375.

[102] *See I-Star Communications Corp. v. City of East Cleveland*, 885 F. Supp. 1035, 1042 (N.D. Ohio 1995) (holding that a franchise application must be denied before there is an actionable claim under 47 U.S.C. § 541(a)(1)).

[103] *See, e.g.*, H.R. Rep. No. 934 at 26, *reprinted in* 1984 U.S.C.C.A.N. 4655, 4663 (1984) (Congress intended that "the franchise process take place at the local level where [local] officials have the best understanding of local communications needs and can require cable operators to tailor the cable system to meet those needs.").

[104] As indicated elsewhere in these comments, the LFAs do not believe the FCC possesses any authority under § 621(a)(1) to interfere in local franchising processes, let alone before a final decision is made.

for example, Congress provided that judicial relief may be predicated on either "a failure of the franchising authority to act in accordance with the procedural requirements of this section" or a "final decision of a franchising authority."[105] The absence of similar language in § 541(a)(1) means interlocutory relief from the FCC cannot be implied.[106] Accordingly, any FCC intrusion into the franchising process prior to the final denial of a franchise application, under the rubric of enforcing § 621(a)(1), would be inconsistent with the statutory scheme established by Congress, and an *ultra vires* exercise of authority for the reasons stated above.

It is also important to point out that the Commission impermissibly attempts to modify and expand the plain language and meaning of Section 621(a)(1) in ¶¶ 16, 17 and 19 of the NPRM. In those paragraphs, the FCC states that § 621(a)(1): (i) bars local franchising requirements which "undermine the well-established goal of increased MVPD competition and, in particular, greater cable competition within a given franchise territory;" and (ii) "prohibits not only the ultimate refusal to award a competitive franchise, but also the establishment of procedures and other requirements which have the effect of unreasonably interfering with the ability of a would-be competitor to obtain a franchise . . . ." Section 621(a)(1), however, makes no mention of local franchising authority processes that "undermine" competition or unreasonably interfere with a franchise applicant's ability to obtain a competitive franchise. Rather, the specific limitation on local action laid out by Congress in Section 621(a)(1) is that local franchising authorities cannot unreasonably refuse to award an additional competitive franchise. In other words, Congress was worried about the end result of the franchising process, not intermediate steps, and provided a judicial remedy for final denials of competitive franchise applications. The Commission's interpretation of § 621(a)(1) is therefore flawed and

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[105] *See* Section 626(e)(1) of the Cable Act, 47 U.S.C. § 546(e)(1).
[106] *See Nashoba Communications, L.P. v. Town of Danvers,* 893 F.2d 435 (1st Cir. 1990).

unsupportable. Moreover, such an interpretation would likely create a significant administrative burden for the Commission, because it would be responsible for reviewing thousands of franchise application disputes.

Aside from creating administrative burdens, the FCC's view of Section 621(a)(1) would generate evidentiary problems (*e.g.*, how is it possible to divine the difference between a legitimate police power requirement and a franchising requirement that unreasonably interferes with an applicant's ability to obtain a franchise) and potential Constitutional problems, if the FCC acts to require a local franchising authority to provide access to its public property and public rights-of-way without fair compensation. Further, the FCC's approach to § 621(a)(1) appears to suggest that there is some sort of presumption that competitive cable franchise applicants are entitled to a franchise, and that local franchising authorities must overcome that presumption. The Commission should be reminded, however, that "Congress intended to leave the States with the power to determine the bases on which to grant or deny additional franchises, with the only caveat being that the basis for denial must be 'reasonable.'"[107]

### B. Section 1 of the Communications Act, 47 U.S.C. § 151, and Section 4(i) of the Communications Act, 47 U.S.C. § 154(i) Do Not Provide the FCC with Any Preemptive Power Over Local Franchising Requirements and Procedures.

At the outset, the LFAs wish to make clear that Title I of the Communications Act, as amended, 47 U.S.C. § 151, *et seq*. does not give the FCC unlimited preemptive power. In fact, Title I gives the FCC only very limited powers, which can only be exercised as a function of the authority that is provided in the substantive provisions of the Communications Act. Overall, Title I only (i) details the purposes of the Communications Act, (ii) lists defined terms, (iii) establishes the FCC and (iv) defines the FCC's jurisdiction (*e.g.*, interstate communication by

[107] *See Cable TV Fund 14-A, Ltd. V. City of Naperville,* 1997 WL 280692 at *16 (N.D. Ill. 1997).

wire and radio). There is no *specific* grant of authority over cable franchising in Title I. This is because Title I pertains to communication by wire or radio.[108] Local cable system franchising, however, is not communication by wire or radio. Rather, it is the sovereign exercise of power over how, when and where, and under what terms and conditions, public rights-of-way may be utilized by private entities.

It is settled law that administrative agencies, such as the FCC, may only act pursuant to authority delegated by Congress.[109] Congress, however, has not provided the FCC with specific powers to micromanage the local cable franchising process. It is for this reason that the FCC relies on Sections 1 and 4(i) of the Communications Act for apparent authority to preempt and supersede local franchising requirements that it deems to be barriers to multichannel video competition and the deployment of advanced broadband networks.

1. Section 1 of the Communications Act, 47 U.S.C. § 151.

As noted in ¶ 15 of the NPRM, Section 1 of the Communications Act, 47 U.S.C. § 151, specifies that the Commission will "execute and enforce the provisions of this Act." This provision, however, "does not give the FCC unlimited authority to act as it sees fit . . . ."[110] In this regard, the FCC itself has held that its mandate to execute and enforce the Communications Act:

> must . . . be read in conjunction with the more specific provisions of the Act and with due regard for the divisions of responsibility for enforcement and interpretation that Congress specified in both the specific words of those amendments to the [Communications]

[108] *See* 47 U.S.C. § 152(a).
[109] *See, e.g., American Library Ass'n v. FCC*, 406 F.3d, 689, 691 (D.C. Cir. 2005).
[110] *See Motion Picture Ass'n of America v. FCC*, 309 F.3d 796, 798-99 (D.C. Cir. 2002).

> Act adopted in the Cable Act and in the legislative history of those amendments.[111]

The Commission has therefore acknowledged that any power it has under § 151 to "execute and enforce" must be derived from other substantive provisions of the Communications Act.[112] Thus, in the context of the NPRM, there must be independent statutory authority in the Communications Act, presumably in Title VI, that specifically enables the FCC to preempt local franchising processes and procedures as an enforcement tool.[113] Title VI, however, addresses initial franchising in a very limited way, and certainly does not countenance Commission intrusion into local franchise processes. If Congress had intended to enable the FCC to intrude into a fundamental area of state/local sovereignty (like local franchising), it would have had to make its intent clear and unmistakable, as required by *Gregory v. Ashcroft*.[114] The LFAs posit that there is no clear and unmistakable authority in the Communications Act pursuant to which

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[111] *See In the Matter of Amendment of Parts 1, 63 and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984*, Memorandum Opinion and Order, 104 F.C.C.2d 386, 391 at ¶ 13 (1986).

[112] *See, e.g., California v. FCC*, 905 F.2d 1217, 1240 (9th Cir. 1990) (holding that "Title I is not an independent source of regulatory authority . . .") and *American Library Ass'n v. FCC*, 406 F.3d 689, 701 (D.C. Cir. 2005) (quoting *Federal Communications Comm'n v. Midwest Video Corp*, 440 U.S. 689, 706 (1979), in which the Supreme Court stated "without reference to the provisions of the Act directly governing broadcasting, the Commission's jurisdiction [under Title I] would be unbounded.") Stated differently, FCC authority under Title I must be grounded in and is limited by authority provided elsewhere in the Communications Act. *See also Home Box Office v. FCC*, 567 F.2d 9, 26 (D.C. Cir. 1977) ("Despite the latitude which must be given to the Commission to deal with evolving technology, its regulatory authority over cable television is not a *carte blanche*.").

[113] *Id.*

[114] *See, e.g., City of Dallas v. FCC*, 165 F.3d 341, 347 (5th Cir. 1999) (stating that the "FCC's preemption of local franchising requirements is at odds with the Act's preservation of state and local authority and with the 'clear statement' principle the Supreme Court has articulated"). *See also, City of Abilene v. FCC*, 164 F.3d 49 (D.C. Cir. 1999), in which the court stated "[f]ederal law, in short, may not be interpreted to reach into areas of State sovereignty unless the language of the federal law compels intrusion."

the FCC may preempt local franchising processes and procedures.[115] To the contrary, Congress intended the Cable Act to preserve local franchising processes.[116] Thus, any rules adopted by the FCC interfering with or preempting local franchising procedures, or any preemption of local franchising based on 47 U.S.C. § 151, would be arbitrary and capricious.[117]

2. Section 4(i) of the Communications Act, 47 U.S.C. § 154(i).

Section 4(i) of the Communications Act, 47 U.S.C. § 154(i), provides that the FCC may "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions."[118] This provision is known as the Communications Act's "necessary and proper" clause.[119] Authority wielded under § 4(i), however, must be based in specific powers the FCC possesses elsewhere in the Communications Act.[120] The following quote from former FCC Chairman Michael Powell is illustrative of this point:

> [i]t is important to emphasize that section 4(i) is not a stand-alone basis of authority and cannot be read in isolation. It is more akin to a "necessary and proper" clause. Section 4(i)'s authority must be "reasonably ancillary" to other express provisions. And, by its express terms, our exercise of that authority cannot be "inconsistent" with other provisions of the Act. The reason for these limitations is plain: Were an agency afforded *carte blanche* under such a broad provision, irrespective of subsequent

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[115] *See, e.g., Cable Television Ass'n of New York v. Finneran*, 954 F.2d 91, 98 (2nd Cir. 1992) (The "Act cut back on federal authority in some places – particularly control of franchising.").
[116] *City of Dallas*, 165 F.3d at 348-49. *See also Cable TV Fund 14-A, Ltd. V. City of Naperville*, 1997 WL 280692 at *16 (N.D. Ill. 1997).
[117] *See, e.g., Motion Picture Ass'n of America*, 309 F.3d at 801 ("Deference to an agency's interpretation of a statute is due only when the agency acts pursuant to 'delegated authority.'").
[118] 47 U.S.C. § 154(i).
[119] *See, e.g., U.S. West, Inc. v. FCC*, 778 F.2d 23, 26 (D.C. Cir. 1985).
[120] *Id. See also California v. FCC*, 905 F.2d 1217, 1240 at n. 35 (9th Cir. 1990) (concluding that Title I of the Communications Act "is not an independent source of authority;…it confers on the FCC only such power as is ancillary to the Commission's specific statutory responsibilities….") and *North American Telecomms. Assoc. v. FCC*, 772 F.2d 1282, 1292 (7th Cir. 1985) (stating that "Section 4(i) is not infinitely elastic").

> congressional acts that did not squarely prohibit action, it would be able to expand greatly its regulatory reach.[121]

The District of Columbia Circuit Court of Appeals agreed with this explanation of the limits on FCC authority under 47 U.S.C. § 154(i).[122] Accordingly, it is clear that the FCC cannot act under § 154(i) without explicit delegated authority from another provision of the Communications Act.[123]

Title VI may furnish the FCC with limited authority over certain franchise terms, but that authority does not reach the local franchising process and local government property rights. Indeed, the FCC has a very limited role to play under the dual federal-state/local regulatory scheme Congress established in Title VI. That scheme preserves municipal authority over public rights-of-way, including the right to require franchises from cable operators,[124] to the extent permitted by state law. There is no language in Title VI or the legislative history of the Cable Act which expressly states otherwise and delegates authority to the Commission to preempt local franchise processes. Consequently, there is no explicit authority in the Cable Act on which the FCC can lawfully base any "ancillary" power to preempt the local franchising requirements and procedures.[125] For this reason, § 4(i) of the Communications Act, 47 U.S.C. § 154(i), cannot

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[121] *Motion Picture Ass'n of America v. FCC*, 309 F.3d at 806.

[122] *Id.*

[123] *See Louisiana Public Service Comm'n*, 476 U.S. at 375 ("[A] federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority…. We simply cannot accept an argument that the FCC may nevertheless take action which it thinks will best effectuate federal policy. An agency may not confer power upon itself.").

[124] *See National Cable Television Ass'n v. FCC*, 33 F.3d 66, 69 (D.C. Cir. 1994) (noting that one of the fundamental purposes of the Cable Act is to "preserve the local franchising system").

[125] *See, e.g., California*, 905 F.2d at 1240, n. 35 (wherein the court stated, in the context of Title II common carrier regulation, "[t]he system of dual regulation established by Congress cannot be evaded by the talismanic invocation of the Commission's Title I authority."). This conclusion is just as relevant to the dual regulatory scheme established by Title VI of the Communications Act.

reasonably be construed to permit the FCC to preempt local franchising schemes or to adopt rules intruding into the franchising process.

If § 154(i) was interpreted to authorize preemption of local franchising requirements and procedures, it would render one of the underlying purposes of Title VI meaningless (*i.e.*, preserving local franchising authority). Such an approach would be inconsistent with the basic precepts of statutory construction, which provide that the courts "should not read one part of a statute so as to deprive another part of meaning."[126]

### C. Any Attempt by the FCC to Interfere with or to Supersede Local Franchising Authority Could Have Constitutional Implications.

Any attempt to preempt lawful local government control of public rights-of-way by interfering with or superseding local franchising requirements, procedures and processes could constitute an unconstitutional taking under the Fifth Amendment of the United States Constitution. This principle goes back to the Telegraph Act of 1866. For example, in *Postal Tel. Cable Co. v. City of Newport*, the Kentucky Court of Appeals, citing several United States Supreme Court cases held:

> The Congress of the United States has no power to take private property for public purposes without compensation, and it can no more take the property of a state or one of its municipalities than the property of an individual. The acts of Congress…conferred on the [telecommunications company] no right to use the streets and alleys of the city…which belonged to the municipality.[127]

In the same vein, the United States Supreme Court has consistently held that local public rights-of-way cannot be given away to communications companies by Congress without reasonable

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[126] *See, e.g., Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 85 (2nd Cir. 1995).

[127] *See Postal Tel. Cable Co. v. City of Newport*, 76 S.W. 159, 160 (Ky. 1903) (*citing St. Louis v. Western Union Tel. Co.*, 148 U.S. 92 (1893) and *Postal Tel. Co. v. Baltimore*, 156 U.S. 210 (1895)). *See also* Clarence A. West, *The Information Highway Must Pay Its Way Through Cities: A Discussion of the Authority of State and Local Governments to be Compensated for the Use of Public Rights-of-Way*, 1 Mich. Telecomm. Tech L. Rev. 29 (1995).

compensation for the use of the local public rights-of-way.[128] For instance, in *St. Louis v. Western Union Tel. Co.*, the court rejected Western Union's claim that a City could not impose a pole charge on its use of the local rights-of-way, in light of the Telegraph Act of 1866,[129] which granted rights to telegraph companies to use federal post roads for interstate telegraph operations and prohibited states and local governments from interfering with those operations.[130] In so doing, the Court held that the 1866 Telegraph Act did not grant an unrestricted right to appropriate the public property of a state.[131] Accordingly, the federal government did not have the power to "dispossess the State of such control and use, or appropriate the same to its own benefit, or the benefit of any corporations or grantees, without suitable compensation to the State. This rule extends to streets and highways; they are public property of the state."[132]

In *Western Union Tel. Co. v. City of Richmond*, Justice Holmes held the Telegraph Act of 1866 was "only permissive, not a source of positive rights…. [The statute] gives the appellant [the telegraph company] no right to use the soil of the streets…."[133] Finally, in *Postal Tel.-Cable Co. v. City Richmond*, the last significant Supreme Court Case addressing the Telegraph Act of 1866 and local authority to receive compensation, the Supreme Court succinctly held that "even interstate business must pay its way – in this case for its right-of-way and the expense incident to the use of it."[134]

This line of cases illustrates that there is over one hundred years of legal precedent holding that the federal government cannot take local public rights-of-way without just

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[128] *St. Louis v. Western Union Tel. Co*., 148 U.S. 92 (1893).
[129] *Id*.
[130] 14 Stat. 221 (1866).
[131] *St. Louis v. Western Union Tel. Co*., 148 U.S. 92, 100 (1893).
[132] *Id.* at 100-01.
[133] *Western Union Tel. Co. v. City of Richmond*, 224 U.S. 160, 169 (1912).
[134] 249 U.S. 252, 259 (1919).

compensation and that communications companies must pay for their use of public property for private profit. Any attempt by the Commission commandeer public property by restricting or preempting local franchising processes, procedures and requirements would not only be unlawful under the Communications Act, it would also be an unconstitutional taking under the Fifth Amendment. Moreover, if the Commission was to interfere with the terms under which a competitive franchise is granted, it could force modifications to existing cable franchises, pursuant to state and local level playing field requirements. This, in turn, could deprive the LFAs and other franchising authorities of lawful and reasonable compensation they negotiated with incumbent cable operators for the use of the public rights-of-way. Any such action by the Commission would raise Fifth Amendment issues.

When dealing with Constitutional concerns, like Fifth Amendment takings, a federal agency "must demonstrate that the recited harms are real, not merely conjectural . . ."[135] The Commission has not cited to any real harms for preempting local franchising processes in the NPRM. Rather, the NPRM refers only to allegations[136] which are unsupported or do not demonstrate a nationwide problem warranting federal intrusion into local rights-of-way management. The evidence in these comments shows that local franchising does not constitute an unreasonable barrier to entry but, rather, promotes competition and the universal availability of advanced services. Consequently, the NPRM appears to be an attempt to find a solution for a problem that does not truly exist. Under these circumstances, any preemptive regulations the FCC might adopt pursuant to the NPRM would be arbitrary and capricious.[137] Moreover, the LFAs would remind the Commission that it should interpret the Communications Act in such a

[135] *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 664 (1994).
[136] *See* NPRM at ¶ 11.
[137] *Turner Broadcasting System*, 512 U.S. at 664.

way as to avoid Constitutional concerns.[138] That result can be achieved by avoiding preemption of local franchising processes and procedures.

### D. The Commission Should Refrain From Preempting or Restricting Local Franchising Processes Because it Lacks Expertise.

The FCC has stated that it is "reluctant to exercise jurisdiction in areas where . . . [it] possesses no expertise . . . ."[139] Local franchising is an area where the Commission has no expertise. Unlike local officials, the FCC is not in a position to know what franchising procedures, policies and requirements will promote competition, prevent economic redlining, encourage the growth and deployment of advanced cable systems, and ensure that cable-related needs and interests are met in each community across the nation. This is because what will be effective in a particular jurisdiction will depend on uniquely local factors, such as demographics, population patterns and densities, and the nature and scope of existing facilities in the public rights-of-way. Furthermore, the Commission has no experience franchising cable systems. Local franchising authorities have decades of experience. Accordingly, local governments know what types of franchising procedures and requirements are necessary and most efficient. Local governments are also acutely aware of their needs, and how cable operators can meet those needs consistent with the Cable Act. Given the local nature of issues associated with the construction and operation of cable systems and cable franchising, the FCC cannot possibly craft a reasonable "one size fits all" approach to franchising or make reasonable judgments about whether

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[138] *See, e.g., I.N.S. v. St. Cyr*, 533 U.S. 289, 299-300 (2001).

[139] *See In the Matter of Amendment of Parts 1, 63 and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984*, Memorandum Opinion and Order, 104 F.C.C.2d 386, 394 at ¶ 21 (1986).

municipal franchising regimes are inconsistent with federal goals.[140] The Commission should therefore refrain from preempting or superseding local franchising processes.

## IV. LEVEL PLAYING FIELD PROVISIONS DO NOT NECESSARILY INHIBIT COMPETITION OR THE DEPLOYMENT OF ADVANCED BROADBAND NETWORKS.

Paragraph 14 of the NPRM solicits comments on the impact "level playing field" provisions might have on the ability of new entrants to obtain competitive franchises. The LFAs assert that, although level playing field requirements may vary from jurisdiction to jurisdiction, as a general matter, level playing field provisions that provide local franchising authorities with flexibility to tailor franchise terms to existing circumstances, consistent with state and federal law, are not inherently anti-competitive. Many level playing field provisions, for instance, have been interpreted not to require a local franchising authority to award a franchise to a competitor that is identical to the franchise awarded to the incumbent cable operator.[141] Rather, level playing field provisions have typically been interpreted to require a competitive cable franchise to be no more favorable or less burdensome, *taken as whole*, than the cable franchise granted to the incumbent cable operator.[142] Level playing field requirements have also been construed to require incumbent and competitive cable franchises merely to be similar.[143] This flexibility permits local franchising authorities and competitive entrants to negotiate franchise terms that make sense in light of the marketplace, state requirements, local demographics and topology,

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[140] As indicated above, the LFAs do not believe the FCC has authority to preempt local franchising authority, procedures and requirements in any event.

[141] *See, e.g., Cable TV Fund 14-A, Ltd. V. City of Naperville*, 1997 WL 280692 at * 12 (N.D. Ill. 1997), *United Cable Television Service Corp. v. Connecticut Dept. of Public Utility Control*, 1994 WL 495402 at *5-*6 (Conn. Super. 1994) and *Knology, Inc. v. Insight Communications Co.*, 2001 WL 1750839 at *2 (W.D. Ky. 2001).

[142] *Id. See also*, for example, § 2.2.3 of the franchises granted by the North Metro Telecommunications Commission's member cities and § 2.2.3 of the franchise granted by the South Washington County Telecommunications Commission.

[143] *See, e.g., WH Link, LLC v. City of Otsego*, 664 N.W.29 390, 396 (Minn. App. 2003).

population density and current needs and interests. Moreover, notwithstanding state and local level playing field requirements, federal law requires local franchising authorities to allow a competitive entrant's "cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area . . . ."[144] Thus, local franchising authorities can work with a competitive cable operator to establish social obligations that satisfy the community's needs and applicable level playing field requirements, while structuring financial and in-kind compensation and build-out requirements in such a way as to ease market entry. In some cases, a competitive franchise applicant may have already constructed a telecommunications network in a municipality, so build-out requirements would not be much of an issue in any event.

The Commission should also be aware that courts have previously considered level playing field requirements and concluded that they are not anti-competitive. For instance, the *City of Naperville* court found that:

> the [Illinois] Overbuild Act's requirement that additional franchises be granted on terms no more favorable or less burdensome than those in the incumbent's franchise area does not inhibit competition by excluding potential competitors. Rather, the Overbuild Act is designed to ensure fair competition, a goal that certainly does not conflict with the pro-competitive purpose of the Cable Act.[145]

Similarly, the United States District Court in the *Knology* case determined that "[t]he ordinance here requires that additional franchises be granted on terms no more favorable or less

[144] 47 U.S.C. § 541(a)(4)(A).
[145] *City of Naperville*, 1997 WL 280692 at *16.

burdensome than those in the incumbent's franchise. Such a requirement does not inhibit competition by excluding potential competitors. Rather, it ensures fair competition."[146]

Finally, it is important to note that several playing field statutes were in effect at the time Congress enacted the 1992 amendments to the Cable Act promoting competition.[147] Congress chose not to preempt those statutes. Accordingly, it is appears that Congress did not consider level playing field requirements to be an insurmountable obstacle to the pro-competitive objectives of the Cable Act.

## V. CONCLUSION.

The LFAs support fair competition in the multichannel video distribution market, and actively encourage the deployment of advanced networks through the local franchising process. It is through local franchising that cable systems have grown and flourished, and have become capable of providing advanced services to much of the population in the United States. The LFAs and other local franchising authorities are acutely aware of the importance of cable systems in today's information economy, and have fashioned franchise requirements that promote universal network availability, while ensuring that cable systems are capable of meeting a community's needs for high-quality service and diverse sources of information. When faced with an application for an additional franchise, local franchising authorities have every incentive to treat the applicant fairly, because the existence of multiple advanced broadband networks in a jurisdiction can lower rates, improve customer service, and encourage the development of new services. No provider, however, should be able to obtain an unfair advantage from the

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[146] *Knology, Inc.*, 2001 WL 1750830 at *2. *See also Comcast Cablevision of New Haven, Inc., v. Connecticut Dept. of Public Utility Control*, 1996 WL 661805 at *3 (Conn.Super. 1996) (stating that a state level playing field statute "envisions a level playing field so that an applicant for a new franchise does not enter the market at a competitive advantage").

[147] *City of Naperville*, 1997 WL 280692 at *16.

franchising process. Level playing field requirements which afford local governments the flexibility to address individual circumstances can therefore be used to create a competitively neutral environment in which cable operators can compete fairly. In Minnesota, for instance, it is evident that state and/or local level playing field requirements have spurred the successful development of competitive cable systems in forty-seven (47) communities.

Contrary to the claims of the telephone industry, competition is developing and advanced networks are being deployed. As indicated in Commission data, competitive cable franchises are being awarded nationwide, and advanced telecommunications capability is being made available in a reasonable and timely manner.[148] The evidence proffered by the telephone industry concerning "barriers to entry," on the other hand, is unsupported and at best highlights isolated instances of unreasonable behavior by local governments. Minnesota law, with its minimum franchise requirements and clearly defined application process, lays out a reasonable process for evaluating applications, makes it relatively quick and easy to obtain a cable franchise, as evidence by the number of competitive cable franchises that have been granted across the state.

Because the existing local franchising process is not broken, there is no need to "fix it" by preempting or restricting local authority. Even if there is a problem (which there is not), the FCC has no authority under 47 U.S.C. §§ 151, 154(i) and 541(a)(2) to take any remedial action. If the Commission was to act, by effectively mandating forced entry into public rights-of-way, Constitutional issues would arise. Those issues can be avoided by maintaining the dual regulatory system Congress established 1984. That system preserves local franchising and, with certain narrow limitations, leaves cable franchising requirements, procedures and decisions in

[148] *See Availability of Advanced Telecommunications Capability in the United States*, Fourth Report to Congress, 19 FCC Rcd 20540 (2004).

the hands of local governments. Accordingly, the FCC should forbear from preempting, restricting or modifying local franchising policies and procedures.

**CERTIFICATION PURSUANT TO 47 C.F.R. § 76.6(a)(4)**

The undersigned signatory has read the foregoing Initial Comments of the Burnsville/Eagan Telecommunications Commission; the City of Minneapolis, Minnesota; the North Metro Telecommunications Commission; the North Suburban Communications Commission; and the South Washington County Telecommunications Commission and to the best of my knowledge, information and belief formed after reasonable inquiry, they are well grounded in fact and are warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and are not interposed for any improper purpose.

Respectfully submitted,

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